

Procedures of the Advisory Council on Historic Preservation

By Charles Spilker*

ABSTRACT

The Advisory Council on Historic Preservation is mandated by statute to review and comment on Federal Agency undertakings that effect properties included in or eligible for inclusion in the National Register of Historic Places. The objective is to assist the Federal agencies in carrying out their responsibility of protecting cultural properties. The Council's "Procedures for the Protection of Historic and Cultural Properties (36 CFR Part 800)" is the process through which Federal agencies determine how to take into account the effects of their undertakings. The process is herein described from the initial identification of cultural properties through Council consideration at one of its regularly scheduled meetings. It is emphasized that the Council's role should be one of positive assistance to Federal agencies in their efforts to protect and enhance our cultural environment.

THE Advisory Council on Historic Preservation, established by the National Historic Preservation Act of 1966, is an independent advisory body within the Executive Branch of the Federal Government. The Council consists of 29 members, 12 citizen members appointed by the President and 17 ex-officio members including the Secretaries of Interior, Agriculture, Transportation, Housing and Urban Development, Commerce, Treasury, State, Defense, and Health, Education, and Welfare, the Administrator of the General Services Administration, the Attorney General, the Secretary of the Smithsonian Institution, the Chairman of the National Trust for Historic Preservation, the Chairman of the Council on Environmental Quality, the Chairman of the Federal Council

on the Arts and Humanities, the Architect of the Capitol, and the President of the National Conference of State Historic Preservation Officers.

Essentially, the Council's responsibilities are 2-fold: to advise, coordinate, assist, recommend, and encourage federal agencies in matters of preservation and to ensure, as far as possible, the protection of cultural properties, included on or eligible for inclusion on the National Register of Historic Places, from adverse effect by federal agency undertakings.

It is the federal agencies that are charged with the protection of cultural properties. The Council's Office of Review and Compliance assists the agencies in discharging their responsibilities. Primary authority comes from Section 106 of the National Historic Preservation Act of 1966. The Act states that the head of any Federal agency having direct or indirect jurisdiction over a proposed federal, federally assisted, or federally licensed undertaking shall, prior to the approval of the project, take into account the project's effect upon any property listed in the National Register of Historic Places. The Act further provides that the Advisory Council shall have a reasonable opportunity to comment on the effect of the undertaking upon any National Register property. Executive Order 11593, "Protection and Enhancement of the Cultural Environment," of May 1971, broadened this protection to include properties determined

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by the Secretary of the Interior to be eligible for listing in the National Register of Historic Places. On September 28, 1976, President Ford signed PL 94-422 which, among other things, amends Section 106 by inserting after the words "included in" the phrase "or eligible for inclusion in." The amendment affords statutory affirmation of the broadened protection given by the Executive Order. The Council's "Procedures for the Protection of Historic and Cultural Properties" (36 CFR Part 800) were developed to implement the Act and the Order. They detail how a federal agency should take into account the undertaking's effect on properties included in or eligible for inclusion in the National Register of Historic Places.

The first step in the compliance process is the identification and evaluation of all properties included in or eligible for inclusion on the National Register that are located within the potential environmental impact area of the Federal undertaking, including both federally owned and non-federally owned land. In compiling this information, the Federal agency should consult all the available sources, including the National Register, the State Historic Preservation Officers, the state archeologists, and state and local historical and archeological societies. As a result of such consultation it is often found that cultural resources have not been adequately surveyed *and thus the federal agency should provide for such a survey.*

It is the federal agency's responsibility to ensure that all properties included on or eligible for inclusion on the National Register have been identified. This is best achieved by assuming that the area of impact contains eligible National Register properties, and these must be located. Too often a federal agency will assume there are none, and when sites are found it is too late to adequately mitigate the adverse effect. In accordance with federal legislation the federal agency should identify and evaluate all cultural resources to ensure that all cultural resources are taken into account at the earliest stages of the agency's planning process so that no property meeting the National Register criteria is inadvertently lost or impaired by the agency's undertaking.

The second step in the process is a determination by the federal agency whether any historic, archeological, architectural, or cultural resources, included on or eligible for inclusion on the National Register, will be affected by the proposed undertaking. In determining effect the federal agency, in consultation with the State Historic Preservation Officer, applies the criteria of effect: an undertaking is considered to have an effect when any condition of the undertaking causes or may cause any change—beneficial or adverse—in the quality of the historical, architectural, or archeological character that qualified the property under the National Register criteria.

If the federal agency finds that there will be no effect, then the requirements of the law have been satisfied, and there is no advisory Council involvement in the matter. The federal agency must keep adequate documentation of a finding of no effect as evidence of compliance with the law. The Council has reserved the right to object to no effect determinations if it has reason to do so.

If the federal agency finds that there will be an effect, then it, in consultation with the State Historic Preservation Officer, applies the criteria of adverse effect. Generally, adverse effects occur under conditions which include but are not limited to: a) destruction or alteration of all or part of a property; b) isolation from or alteration of its surrounding environment; c) introduction of visual, audible, or atmospheric elements that are out of character with the property or alter its setting; d) transfer or sale of a federally owned property without adequate conditions or restrictions regarding preservation, maintenance, or use; and 3) neglect of a property resulting in its deterioration or destruction.

If a federal agency finds that there will be no adverse effect, then the agency forwards adequate documentation to the Advisory Council for review. Adequate documentation includes:

- 1) a description of the undertaking;
- 2) location and significance of National Register and eligible National Register properties;

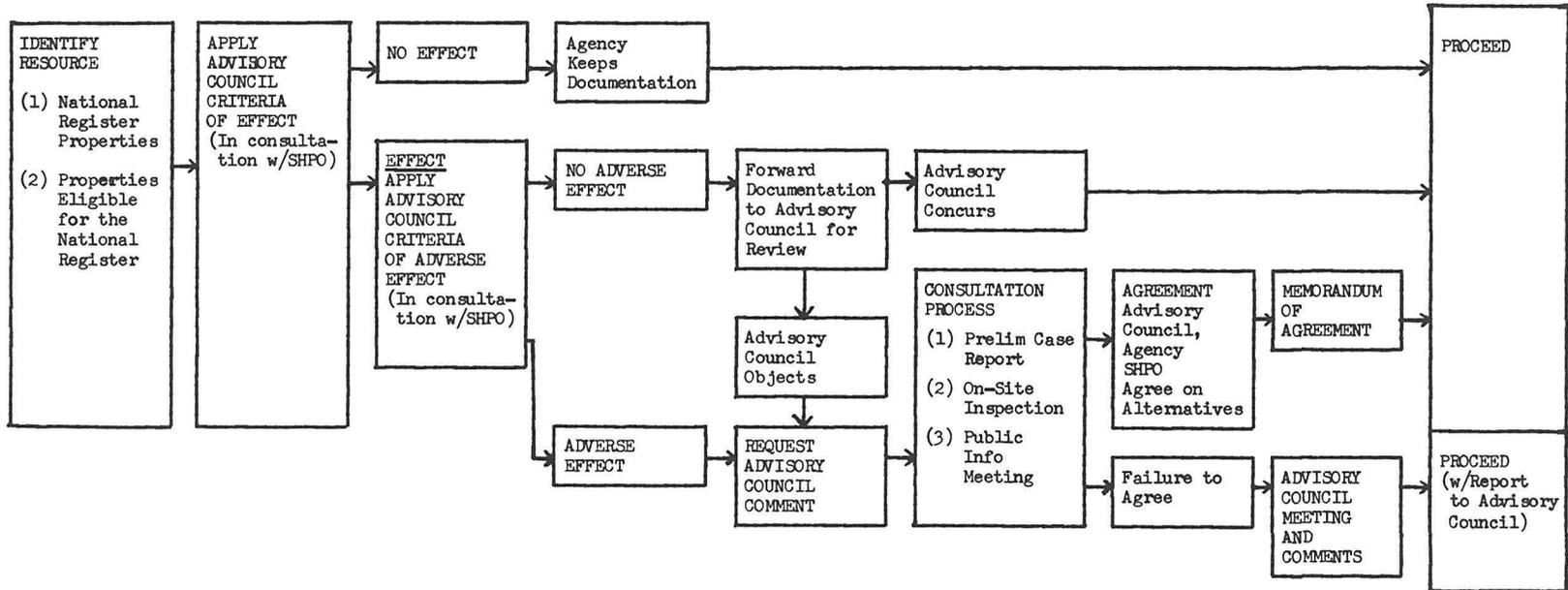


Fig. 1. Advisory Council: Procedures for the Protection of Historic and Cultural Properties.

- 3) a discussion concerning the applicability of the criteria of effect and of adverse effect;
- 4) a statement that the federal agency, in consultation with the State Historic Preservation Officer, has made a determination of no adverse effect;
- 5) a copy of the comments of the State Historic Preservation Officer; and
- 6) maps and graphics as appropriate.

The Advisory Council has 45 days from receipt of adequate documentation to register an objection to a determination of no adverse effect. The Council usually reviews these cases in less than 45 days—it averages 10 days between the receipt of the adequate documentation and reply. If there is no reply within 45 days or if the Council concurs in the adequately documented determination of no adverse effect, then the requirements of the law have been satisfied, and there is no further Advisory Council involvement in the matter.

If the Council objects to a determination of no adverse effect, or if the federal agency finds that there will be an adverse effect, then the federal agency requests in writing the Council's comments, including with the request a preliminary case report. The preliminary case report must include:

- 1) a general description of the proposed undertaking with explanatory graphic material;
- 2) a description of the properties included on or eligible for inclusion on the National Register to be affected by the undertaking, identifying the significant features of the properties;
- 3) an evaluation of the effect of the undertaking upon the properties included on or eligible for inclusion on the National Register;
- 4) an outline of measures taken in considering the undertaking's effect upon the properties included on or eligible for inclusion on the National Register, including:

- a) an expression of the views of the State Historic Preservation Officer,
- b) an indication of the support or opposition of units of government, as well as public and private agencies and organizations,
- c) a review of alternatives which would mitigate any adverse effects, and
- d) a review of alternatives which would avoid any adverse effects;

- 5) the status of this project in the agency's approval process; and
- 6) the status of this project in the agency's National Environmental Policy Act compliance process.

The request for comment and the submission of a preliminary case report initiates a formal consultation process, through which the Advisory Council, the federal agency, and the State Historic Preservation Officer review the undertaking. The process may involve an on-site inspection and/or a public information meeting. The object of the consultation process is to find a mutually acceptable means of avoiding or mitigating any adverse impact upon the National Register or eligible National Register property.

If the consultation process results in a solution satisfactory to all the consulting parties, this solution is formalized in a Memorandum of Agreement, which sets forth the terms of accord. The Memorandum of Agreement is evidence of the federal agency's compliance with Section 106 of the National Historic Preservation Act of 1966 or with Section 1(3) or 2(b) of Executive Order 11593 of May 1971, as appropriate.

The Memorandum of Agreement is divided into 2 parts. The first part justifies the action of formalizing the solution and consists of 4 statements:

- 1) identification of the federal agency and its undertaking;
- 2) identification of the National Register or eligible National Register property that the federal agency, in consultation with the State Historic Preservation Of-

ficer, has determined would be adversely affected;

- 3) a statement that, pursuant to the appropriate legal authority, the federal agency has requested the comments of the Advisory Council; and
- 4) a statement that the consultation process has taken place and has resulted in agreement.

The second part of the Memorandum of Agreement contains the mutually acceptable means of avoiding or mitigating any adverse impact upon the National Register or eligible National Register property. The agreement is expressed in terms of stipulations, which in the case of archeological resources include the following:

- 1) a reference to a research design;
- 2) a statement that a particular federal agency is funding or otherwise responsible for overseeing the mitigation;
- 3) a statement that the contract for professional services will include a provision for disposition of artifacts, field notes, and records, photographs, etc., and that these will be available to the public and for research, a provision for backfilling the areas of excavation, and a provision setting a deadline for the final report;
- 4) a time limit within which an eligible property must be nominated to the National Register, if that property is not completely destroyed by the undertaking; and
- 5) any other responsibilities of the federal agency and the State Historic Preservation Officer, *e.g.*, avoidance of areas or sites.

The Memorandum is signed by the Council's Executive Director, a representative of the federal agency, and the State Historic Preservation Officer. It is then ratified by the chairman of the Advisory Council. Under the Council's procedures, ratification by the chairman constitutes the comments of the Advisory Council.

In cases where a Memorandum of Agreement is not possible because of the inability

of the consulting parties to agree, the matter is referred to the chairman who decides whether to consider the case at a full Council meeting. If he decides the full Council should consider the matter, it will be scheduled no less than 60 days from the date of the receipt of the request. The Council meeting results in recommendations to the federal agency which the agency takes into account in making a final decision on the undertaking.

The Council process is a means through which the undertaking may be assessed in the light of the historic, esthetic, economic, social, and other values at stake and through which various alternative actions can be explored. Since the Council is concerned with the public interest, its comment does not necessarily favor the cultural resource. It is rare, however, that some form of mitigation is not possible.

Numerous properties have been the subject of consultation proceedings, successfully concluded by a Memorandum of Agreement. In 1974 out of 331 cases closed, 145 or 44% of the cases were concluded by means of a Memorandum of Agreement. The full Council considered only 3 cases.

The time needed to go through Advisory Council procedures depends on the stage in the procedures at which a solution is reached. In cases of no effect there is no Council involvement. In cases where the Advisory Council Executive Director concurs with the agency determination of no adverse effect, the average time is 10 days. In cases that are concluded by means of a Memorandum of Agreement, it takes about a month and a half between the receipt of the preliminary case report and the ratification of the Agreement by the Council Chairman. These time frames do not include the federal agency time neither for preparing adequate documentation for the Council nor for processing and/or implementing the results of the Council's review and comment.

The Advisory Council has a diverse role in the Nation's preservation program: in educating, encouraging, and informing both the federal sector and the public; in general federal policy formulation; and especially in

the protection of our fragile, irreplaceable cultural resources. The continued growth of the National Register, coupled with burgeoning popular interest in historic preservation, portends a future in which the Council will continue to exercise a vital influence in the protection and enhancement of our cultural environment.

It is the supportive rather than the regulatory role of the Council that should be accentuated. Instead of throttling long-awaited projects that are well underway, the Council seeks to assure that all cultural resources are considered right from the start.

The key to a successful resolution of problems coming before the Council is federal agency cognizance of its preservation obligations from the very outset. In other words in the project planning stage of any federally related undertaking, those responsible should see to it that all cultural resources that may be affected are identified and taken into consideration. Thus, when the Advisory Council enters the picture, its role can be one of positive assistance.